



POLICE DEPARTMENT

May 14, 2013

MEMORANDUM FOR: Police Commissioner

Re: Lieutenant Michael Brenyo
Tax Registry No. 910416
Patrol Borough Manhattan North
Disciplinary Case No. 2008-0114

The above-named member of the Department appeared before me on December 6, 2011,¹ May 3, 2012, June 27, 2012 and August 31, 2012,² charged with the following:

1. Said Lieutenant Michael Brenyo, while assigned to Narcotics Borough Bronx, on or about and between July 1, 2007, and October 31, 2007, did wrongfully and without just cause fail to supervise other Members of the Service, to wit: Members of the Service under his supervision were directing other Members of the Service to wrongfully indicate that Police Officers were present for duty or end of tour.

P.G. 202-17, Page 1, Paragraph 1 PATROL SUPERVISOR, DUTIES AND RESPONSIBILITIES

2. Said Lieutenant Michael Brenyo, while assigned to Narcotics Borough Bronx, on or about and between July 1, 2007, and October 31, 2007, did wrongfully and without just cause fail to supervise other Members of the Service under his supervision, to wit: Members of the Service, identities known to this Department, were arriving late to work and failed to submit lost time reports.

P.G. 202-17, Page 1, Paragraph 1 PATROL SUPERVISOR, DUTIES AND RESPONSIBILITIES

¹ The trial was adjourned for four months because Respondent underwent surgery and needed time to recuperate.

² The trial record was held open until December 13, 2012 to give the parties extra time to prepare written summations.

The Department was represented by Penny Bluford-Garrett, Esq., Department Advocate's Office, and Respondent was represented by James Moschella, Esq.

Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Respondent is found Not Guilty of Specification No. 1. Respondent is found Guilty of Specification No. 2.

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called Lieutenant Frank DiVirgilio as its sole witness.

Lieutenant Frank DiVirgilio

DiVirgilio, a 29-year member of the Department currently assigned to the Organized Crime Control Bureau's (OCCB) Quality Assurance Unit, has held the rank of lieutenant since 2002 and has nearly 20 years of supervisory experience with the Department. He worked in OCCB's Investigations Unit from May 2004 to April 2011, a period that included Respondent's alleged offenses. On October 25, 2007, DiVirgilio began investigating Respondent after his unit received an order from the Chief of OCCB to conduct a follow-up investigation regarding Narcotics Borough Bronx (NBBX) on October 17, 2007.

DiVirgilio explained that on October 17, 2007, Lieutenant Brian Murphy, who was assigned to OCCB's Quality Assurance Unit, learned that two members of the service (MOS) assigned to the 40 Module who were supposed to be on duty, and who were listed as present on the roll call, were missing. Murphy examined other roll calls and found what appeared to him to be numerous discrepancies on 40 Module roll calls. Those discrepancies included "signatures on the roll calls that appeared to be all written by the same individuals and signatures of officers . . . signed out and couldn't be accounted for."

DiVirgilio's investigation included reviewing 18 months of roll calls and command logs for time discrepancies to determine if a pattern existed of MOS signing for each other. DiVirgilio also subpoenaed the cell phone records, cell site records, and personal E-ZPass records to determine the MOS's locations at specific times. He learned through these documents that MOS had been signed in as present for duty when they were actually at other locations. DiVirgilio found more discrepancies when he reviewed the subject officers' Activity Logs and cross-referenced them to local movement entries. In addition to many omissions, some entries differed with the movement log or movement sheet. DiVirgilio also pulled the Employee Time Records and learned that time was not being deducted for MOS who had been signed in as on time but actually arrived late to work. He also found to be missing many Leave of Absence Reports (UF-28) that should have been prepared for these incidents of lateness.

As a result of the discrepancies that DiVirgilio found in his review of roll call and E-ZPass records, official Department interviews of all of the officers assigned to the 40 Module were conducted. All of these officers admitted to signing each other in. These

members all received Department charges. DiVirgilio explained that Respondent was responsible as a supervisor "to supervise their enforcement, their activities, to monitor their activity and enforcement, to account for his personnel, to review roll calls, to ensure the roll call list, and all the personnel working were accounted for, and ultimately to certify and hand in the finalized roll calls to account for all the people in the module."

On April 18, 2007, the chief of OCCB, Chief Anthony Izzo, issued a Department memorandum to all division commanders. DiVirgilio explained that the memorandum directed that module lieutenants review roll calls for discrepancies and violations and certify the accuracy of the roll calls. Everyone assigned to the modules should have received the memorandum. Even a lieutenant who did not receive the memorandum would have been responsible for the duties and responsibilities delineated in the document. [Department's Exhibit (DX) 1 is a copy of the April 18, 2007 memorandum.]

As part of his investigation, DiVirgilio prepared a spreadsheet summarizing signature discrepancies on the 40 Module roll calls for the period between July and October 2007 [DX 2], a spreadsheet summarizing E-ZPass usage for members assigned to the command during that period [DX 3], and a spreadsheet of Respondent's tour assignments [DX 4]. In addition, he prepared an audit comparing the roll call and E-ZPass records for several of Respondent's subordinates: Sergeant Hewitt, Police Officer Iturralde, Detective Vergeli, Detective Deshazo, and Police Officer Vagnini [DX 5].

DiVirgilio identified copies of the roll calls for the 40 Module for the months of July, August, September, and October 2007 [DX 6]. DiVirgilio testified that the 40 Module roll call logs for the month of July, shows that on July 11, 2007 Respondent signed in on the roll call at the start of tour and signed out on the roll call at the end of

tour that day. Respondent was listed on the roll call as module supervisor, and he certified the roll call at the bottom. Hewitt also signed in on the roll call that day. According to the roll call, Hewitt's originally scheduled tour was to commence at 9:30 a.m., but his tour was adjusted to an 8:05 a.m. start time. Respondent signed the roll call, authorizing this tour adjustment. While it was indicated on the roll call that Hewitt signed in at 8:05 a.m. that day, E-ZPass records showed that he did not cross the Newburgh-Beacon Bridge until 9:23 a.m. With the use of MapQuest, DiVirgilio estimated that the travel time between the bridge and the command was 27 minutes.

According to the roll call for July 19, 2007, Respondent signed in at 6:55 a.m. and was designated as module supervisor. While the roll call also indicated that Hewitt worked a 6:27 a.m. by 3:05 p.m. tour that day, E-ZPass records indicated that he did not cross the Tappan Zee Bridge until 7:08 a.m. According to the roll call for August 9, Respondent signed in at 9:45 a.m. and was again listed as the supervisor. While the roll call indicated that Hewitt signed in at 9:30 a.m. that day, E-ZPass records indicated that he did not cross the Tappan Zee Bridge until 10:26 a.m. According to the September 15 roll call, Respondent signed in as present for duty at 3:00 p.m. While the roll call indicated that Hewitt signed in at 3:30 p.m. that day, E-ZPass records indicated that he did not cross the Tappan Zee Bridge until 4:37 p.m. With the use of MapQuest, DiVirgilio estimated that the travel time between the Tappan Zee and the command was a half hour.

DiVirgilio testified that the audit that he prepared regarding the other MOS under Respondent's supervision showed discrepancies similar to the ones relating to Hewitt. These MOS pled guilty and accepted penalty offers for their misconduct. Deshazo

forfeited 45 penalty days and was placed on dismissal probation after pleading guilty to causing false entries to be made on Department records in that he was listed as present for duty when he was not in fact present, E-ZPass records were in direct conflict with roll calls, and for signing other MOS present for duty or end of tour and directing others to sign him present or end of tour when they were not actually present. For the same misconduct, Vagnini forfeited 25 vacation days and had 112 hours deducted from his time/leave balance and Vergeli forfeited 25 vacation days and had 158 hours deducted from his time/leave balance. After pleading guilty to the same misconduct plus additional acts of misconduct, Hewitt forfeited 60 vacation days and had 112 hours deducted from his time/leave balance, and Detective Santana forfeited 45 vacation days and was placed on dismissal probation. After pleading guilty to the sole specification of signing other members present for duty or end of tour and directing other members to sign him present for duty or end of tour, Detective Atkins forfeited 15 vacation days.

The period of misconduct in these cases included but was not limited to July through October 2007. Other members of the 40 Module under Respondent's supervision received Command Disciplines.

On cross-examination, DiVirgilio testified that he initially submitted his investigation of the 40 Module roll call discrepancies to be closed out before the investigation was re-opened to include Respondent as a subject. One of the charges that Hewitt pled guilty to was failing to supervise the police officers and detectives under his supervision. DiVirgilio explained that normally in investigations "you go one rank above the personnel who are being supervised, and they're held responsible and accountable for the people beneath them." In Respondent's case, he was charged for failing to supervise

Hewitt, the detectives, and the police officers because, DiVirgilio explained, as a team leader Respondent was responsible for everyone under his supervision. Although Respondent's immediate supervisor, Inspector Edward Mullane, was responsible for the overall operation of the command, he was not investigated for any failure to supervise.

About the April 18, 2007 memorandum from Chief Izzo concerning roll call procedures, DiVirgilio explained that while the memorandum was distributed to all OCCB divisions and was supposed to be followed, there was no way for him to know if the procedures were actually implemented at NBBX. Respondent verified and certified roll calls between July and October 2007, as prescribed in the memorandum. Respondent served as the module supervisor or team leader. The duties and responsibilities for his position were laid out in an OCCB Narcotics Division Manual.

DiVirgilio reviewed Narcotics Division Manual Procedure 10-05, which enumerated duties and responsibilities for both the watch commander and module lieutenant. He explained that while these were two distinct positions, the watch commander would assume the duties of the module lieutenant when the module lieutenant was not at work. The procedure DiVirgilio reviewed was dated January 1, 2004, and he did not know if it was still in effect in July 2007. [Respondent's Exhibit A is a copy of Narcotics Division Manual Procedure 10-05, indicating that the watch commander was the person responsible for ensuring the accuracy of the roll call.]

As to members signing for each other on the roll call, DiVirgilio testified, "If you see four or five names in the same pen and the same handwriting -- I'm not a handwriting expert, but you can tell if . . . the same person is signing four or five names."

The Investigations Unit visited NBBX at least once a week, sometimes two or three times a week, between July and October 2007. On each of those visits, Investigations Unit members surveyed the command, inspected Activity Logs, and made sure that people on the roll call were present. DiVirgilio had no idea if on any of those visits before October 17, 2007, discrepancies on the roll call were discovered.

DiVirgilio did not know exactly where in the NBBX building Respondent's office was located. Roll calls were kept on clipboards at the front office right at the building's entrance, near where the watch commander sat. Respondent's name was on the first part of the 40 Module roll call under a section labeled "Team #1." The names of the subordinates who were disciplined for roll call discrepancies appeared in a subsequent part of the roll call under a section labeled "Team # 2." In addition to signing next to their names on the main page of the roll call, members also signed in and out on a subsequent sign-in page. DiVirgilio did not know for certain if in 2007 the roll call sections for Team #1 and Team #2 were kept on the same clipboard.

DiVirgilio testified that Respondent was charged with misconduct for failing to observe the conduct that was going on and taking action to correct the condition. DiVirgilio conceded that if Respondent's office was on the other side of the building than the 40 Module members and there was a separate person in the building assigned as watch commander, Respondent was not required to stay by the roll call to ensure that his members were coming in on time. Respondent should have, nevertheless, maintained a presence to engage and oversee his subordinates.

DiVirgilio reiterated that E-ZPass records showed Hewitt as going through the toll at 9:23 a.m. on July 11, 2007, and that MapQuest gave an estimated travel time of 27

minutes from the toll to the command. This would have had Hewitt arriving at the command at approximately 9:50 a.m. DiVirgilio acknowledged that because Respondent signed in at 9:35 a.m. that day, he would have had only 15 minutes to catch that Hewitt had signed in improperly. DiVirgilio noted that a supervisor is supposed to “see who’s present, you see who’s not present, and you go back to your module and see who’s there and verify roll call.” When asked exactly when Respondent should have accounted for his personnel, DiVirgilio responded, “Whenever he got around to doing it.” While Respondent had a duty as module supervisor to review and inspect the roll call, there was no rule mandating exactly when during his tour the inspection was to take place.

DiVirgilio testified, “Any team module lieutenant is responsible to supervise their team and to take any corrective action when they become aware of any violations or discrepancies and to make those adjustments whether it happens on or off duty, it’s his responsibility to correct and ensure that any ongoing . . . misconduct doesn’t continue.” When asked what duty Respondent violated on July 11, 2007 with regard to Deshazo, Vergeli, and Vagnini, DiVirgilio explained, “These members of the service were coming in late and [Respondent] failed to recognize that they were coming in late and take appropriate action.” While it was indicated on the roll call that Deshazo signed in at 8:27 a.m. on July 11, E-ZPass records showed that he did not cross the Tappan Zee Bridge until 8:31 a.m. DiVirgilio estimated that Deshazo arrived at the command at approximately 9:00 a.m., which was 35 minutes prior to Respondent’s arrival. DiVirgilio conceded that it would have, therefore, been difficult for Respondent to determine that Deshazo was late that day.

While it was indicated on the roll call that Vergeli signed in at 8:33 a.m. on July 11, E-ZPass records showed that he did not cross the Tappan Zee Bridge until 9:07 a.m. DiVirgilio estimated that Vergeli arrived at the command at approximately 9:45 a.m., which would have given Respondent only ten minutes to determine that Vergeli had actually been late to work. Someone would have been assigned to the watch commander's desk at all times.

Respondent started his tour at 4:45 a.m. on July 12. While it was indicated on the roll call that Hewitt signed in at 4:27 a.m. that day, E-ZPass records showed that he did not cross the Tappan Zee Bridge until 4:54 a.m. DiVirgilio estimated that Hewitt arrived at the command at approximately 5:30 a.m. While it was indicated on the roll call that Vagnini and Vergeli also signed in at 4:27 a.m., DiVirgilio estimated that they did not arrive at the command until approximately 5:00 and 5:10 a.m., respectively (with crossings of the Tappan Zee Bridge at 4:39 and 4:38 a.m.). It was indicated on the roll call that Deshazo signed in at 4:00 a.m., but E-ZPass records showed that he was at the Yonkers toll at 4:09 a.m.

Hewitt and Vagnini were scheduled to start their tours at approximately 9:30 a.m. on July 13. DiVirgilio did not know if there was anything that Respondent could have done to monitor these two subordinates since his tour did not start until 3:15 p.m. that day. Similarly, the next day Hewitt and Vagnini arrived at the command before Respondent started his tour at 6:20 a.m. On that day, it was indicated on the roll call that Hewitt signed in at 4:30 a.m., but E-ZPass records showed that he did not cross the Tappan Zee Bridge until 4:55 a.m. DiVirgilio estimated that Hewitt arrived at the command approximately a half hour later. Similarly, Vagnini crossed the bridge at 5:08

a.m. and arrived at the command sometime before 6:00 a.m. Only Vergeli arrived after Respondent's start of tour that day. While Vergeli's tour was scheduled to start at 4:30 a.m., E-ZPass records showed that he was at the Tappan Zee Bridge at 6:40 a.m. He arrived at the command after 7:00 a.m., which was 40 minutes into Respondent's tour. To DiVirgilio's knowledge, there was no warning prior to October 17, 2007 that misconduct was occurring in the 40 Module.

Respondent started his tour at 9:25 a.m. on July 17, and according to the movement log was out in the field between 1:20 and 6:00 p.m. that day. DiVirgilio conceded that, therefore, Respondent would have been in no position to observe if Hewitt and Vagnini were late for their scheduled 1:30 p.m. start of tour. As for July 18, Deshazo, Vergeli, and Vagnini were all scheduled to start work at 7:00 a.m., but Respondent did not start that day until 10:10 a.m. While it was indicated on the roll call that Hewitt signed in at 6:27 a.m. on July 19, DiVirgilio estimated that he did not arrive at the command until 7:30 or 8:00 a.m. (with a crossing of the Tappan Zee Bridge at 7:08 a.m.). Because Respondent started his tour at 6:55 a.m. that day, he would have been able to detect whether or not Hewitt had arrived on time if only he had inspected Hewitt's roll call section within the first hour or so of his (Respondent's) tour. The same is true for Vagnini who was also scheduled for a start time of 6:27 a.m. that day but did not arrive at the command until after 7:00 a.m.

Respondent started his tour at 9:25 a.m. on July 20, and according to the movement log was out of the building between noon and 10:00 p.m. that day. Respondent would have, therefore, not known if Vagnini was on time for his 12:27 p.m. start of tour. Similarly, because Respondent did not start his tour the next day until 12:55

p.m., he would not have known if Vagnini was on time for his 9:00 a.m. start time. And because Respondent did not start his tour until 9:55 a.m. on July 24, he would not have known if Deshazo was on time for his 6:27 start time. Respondent would have had 20 or 25 minutes that day to catch Vagnini as being late since Vagnini was scheduled to start at 9:33 a.m. but did not arrive at the command until 10:15 or 10:20 a.m. (with a crossing of the Tappan Zee Bridge at 9:46 a.m.).

While it was indicated on the roll call that Vagnini signed in at approximately 9:30 a.m. on July 25, E-ZPass records showed that he did not cross the Tappan Zee Bridge until 11:37 a.m. DiVirgilio estimated that Vagnini arrived at the command at approximately 12:00 p.m. While records show that Respondent was present for duty and at the command that day, DiVirgilio conceded that there was no way to know exactly what Respondent was doing during his tour. The next day, Deshazo, Vergeli, and Vagnini were all at work before Respondent started his tour at 4:00 p.m. Respondent started his tour at 9:45 a.m. on July 28. Vagnini was scheduled to start that day at 9:33 a.m. but did not arrive at the command until approximately 11:00 a.m.

DiVirgilio confirmed that the April 18, 2007 memorandum issued by Chief Izzo did not eliminate the position of watch commander. He further confirmed that no prior memorandum was issued to revise the watch commander duties that were enumerated in the 2004 Narcotics Division Manual. Watch commander duties include checking each roll call against rosters, correcting mistaken roll calls, observing that members arrive in a timely manner and accurately enter their starting times on the roll call, determining whether an adjustment or lost time is appropriate when a member arrives late, making members fill out UF-28s, taking steps to locate members who fail to report as scheduled,

and ensuring that all members who enter or leave the facility are documented on the roll call movement sheet. Watch commander duties are separately delineated from those of a module lieutenant. DiVirgilio testified that even though Respondent did not have the duties of a watch commander, Respondent did have “the duties of being the responsible supervisor to manage his personnel.” DiVirgilio could not, however, point to any specific manual or training that would have put Respondent on notice that he was responsible for the duties that had been delegated to the watch commander.

On August 7, Respondent worked from 9:25 a.m. until 9:50 p.m. There was no record of exactly what Respondent was doing during his tour. Vergeli and Vagnini were scheduled to start at approximately 1:30 p.m. that day. While it was indicated on the roll call that Vergeli signed in at 5:00 a.m. on August 8, E-ZPass records showed that he did not cross the Tappan Zee Bridge until 10:02 a.m. DiVirgilio estimated that Vergeli arrived at the command at approximately 10:30 or 10:45 a.m., which was only a half hour or so after Respondent’s 10:00 a.m. start time. DiVirgilio did not know what Respondent’s duties were that day.

Respondent started his tour at 9:45 a.m. on August 9. While it was indicated on the roll call that Hewitt signed in at 9:30 a.m. that day, DiVirgilio estimated that he did not arrive at the command until 11:00 a.m. (with a crossing of the Tappan Zee Bridge at 10:26 a.m.). Similarly, Deshazo was scheduled to start his tour at 8:27 a.m. but did not arrive until approximately 9:30 (with a crossing of the Tappan Zee Bridge at 9:03 a.m.); Vergeli was scheduled to start at 9:00 a.m. but did not arrive until after 11:00 a.m. (which a crossing of the Tappan Zee Bridge at 10:40 a.m.); and Vagnini was scheduled to start at

9:33 a.m. but did not arrive until approximately 1:00 p.m. (with a crossing of the Tappan Zee Bridge at 12:22 p.m.).

Respondent started his tour at 11:00 a.m. on August 10. While records show that Respondent was present in the command, there was no record of what he was doing during his tour. Hewitt was scheduled to start at 9:30 a.m. that day, but E-ZPass records showed that he was crossing the Newburgh-Beacon Bridge at 9:53 a.m. The next day, Vergeli and Vagnini were scheduled to start their tour at approximately 9:30 a.m. While they were both late to work, they were present in the command by the time Respondent started at 3:25 p.m. Similarly, even though Deshazo was more than an hour late to work on August 14 (with a 7:27 a.m. scheduled start time and a Yonkers toll bridge crossing at 8:15 a.m.), he was present in the command by the time Respondent started at 10:00 a.m. And on August 15, both Vergeli and Vagnini were scheduled to start their tour at approximately 6:30 a.m. and were present in the command before Respondent started at 11:25 a.m.

On August 16, Respondent started his tour at 5:00 a.m. Vergeli was scheduled to start at 7:27 a.m., and Vagnini was scheduled to start at 9:33 a.m. Hewitt, who was one of the team supervisors, started at 9:30 a.m. that day.

Even though Vagnini was scheduled to start his tour at 4:33 a.m. and did not cross the Tappan Zee Bridge until 4:40 a.m. on August 21, he had been at work for several hours by the time Respondent started at 9:50 a.m. Vergeli was scheduled to start at 5:27 p.m. that day, but he did not cross the Tappan Zee Bridge until 5:13 p.m. and did not arrive at the command until approximately a half hour later. When asked if Respondent would have had to have been present at the watch commander's post to have caught

Vergeli coming in late, DiVirgilio testified that that was not necessarily true. DiVirgilio explained, "When many of these dates that you have indicated where officers were scheduled to work earlier than the lieutenant was supposed to work and the lieutenant would come in first thing he does is he reviews his roll call." He continued, "Anyone who was supposed to start earlier than him and he sees they didn't sign in, he doesn't have to wait for them at the door to wait for them to come . . . but at some point later in the tour it would merit an inquiry especially if you review the roll call later in the day if you saw that these guys signed in at the times that they were scheduled for."

According to DiVirgilio, even though Respondent signed in on a separate roll call section, "as the module supervisor it's his responsibility when he comes to duty he has to supervise and manage his personnel, he is going to review the two roll calls that's approximately eight to ten names on the roll call to see who is present, who is not present, who is coming in and does he have enough personnel to send out to do enforcements." As one of the team supervisors, Hewitt also had a duty to review the roll calls to make sure that people were where they were supposed to be. The watch commander's duties, meanwhile, were more geared as to when people were coming and going. The watch commander reviewed the roll call later in the tour and made note of when people were not showing up when they were supposed to. As a result of DiVirgilio's investigation, there was one watch commander, Sergeant Moy, who was penalized for failing to review roll calls. Respondent, Hewitt, and Moy all shared responsibility for ensuring the accuracy of the roll calls. The captain, in contrast, would not have been involved in the day-to-day enforcement of the module. When he was

asked what the basis was for his opinion that the module lieutenant was responsible for reviewing the roll call, DiVirgilio answered,

I can't specifically point to something but I can tell you that when someone in the police department . . . is fortunate enough to get promoted into a supervisory rank one of the first things that they are instructed when they go to I guess the supervisor school is how to manage your resources. Resources on the police department could be money, time, overtime, equipment, and personnel, and personnel if you're one of the supervisors that is tasked with supervising personnel the most efficient tool, the most resourceful tool that you have is the roll call so that you could supervise and manage these personnel.

Even though Vergeli and Vagnini were several hours late in arriving at work on August 22, they were both present in the command by the time Respondent started at 11:10 a.m. Similarly, Vagnini was present on August 25 by the time Respondent started his tour at 1:20 p.m. On August 24, Respondent started his tour at 5:15 a.m. but was out of the building conducting enforcement activities between 7:00 a.m. and 2:00 p.m. He would have, therefore, not been present when Vagnini arrived at work for his scheduled 9:33 a.m. tour.

While Vergeli's tour was scheduled to start at 9:27 a.m. on September 4, E-ZPass records showed that he was at the Tappan Zee Bridge at 9:26 a.m. DiVirgilio estimated that Vergeli arrived at the command 27 minutes later. This meant that Respondent, who started his tour at 9:40 a.m. that day, would have had just 13 minutes to catch Vergeli as being late. Similarly, even though Vergeli was nearly 40 minutes late for his scheduled 9:27 a.m. start of tour the next day, he arrived at the command just six minutes after Respondent's 10:00 start time. On September 7, both Hewitt and Vergeli were present by

the time Respondent started his tour at 12:45 p.m., and the next day Vergeli was again present by the time Respondent started his tour.

Respondent started his tour at 10:10 a.m. on September 11 and according to the movement log left the building at 11:10 a.m. Vagnini arrived at the command that day after 11:30 a.m. Even though Vergeli was more than three hours late to work the next day, he was present in the command by the time Respondent started at 10:50 a.m. In contrast, because Vagnini did not cross the Tappan Zee Bridge until 10:46 a.m., he did not arrive until after Respondent's start time. There was no record of what Respondent was doing during his tour.

Vergeli was present in the command on September 14 by the time Respondent started at 2:25 p.m. The next day, Respondent started his tour at 3:00 p.m. Vagnini and Hewitt were scheduled to start at approximately 3:30 p.m. but did not arrive at the command until approximately 4:00 and 5:00 p.m., respectively (with crossings of the Tappan Zee Bridge at 3:26 and 4:37 a.m.). There was no record of what Respondent was doing during his tour.

Respondent started his tour at 9:15 a.m. on September 18 and according to the movement log went out in the field at 11:30 a.m. Hewitt and Vagnini were scheduled to start that day at approximately 10:30 a.m. but did not arrive at the command until approximately 11:00 a.m. and 12:00 p.m., respectively (with crossings of the Tappan Zee Bridge at 10:27 and 11:23). Even though Vergeli and Deshazo were late to work the next day, they were both present in the command by the time Respondent started at 10:50 a.m.

Respondent again started his tour at 10:50 a.m. on September 21. Vagnini was scheduled to start that day at 8:00 a.m. but did not arrive at the command until

approximately 11:00 a.m. (with a crossing of the Tappan Zee Bridge at 10:33 a.m.).

There was no record of what Respondent was doing during his tour. Based on E-ZPass records, it is possible that Vergeli made it to work on time the next day. On September 25, Respondent started his tour at 9:30 a.m. Vergeli was scheduled to start his tour at 10:27 a.m. that day but did not arrive at the command until approximately 11:00 a.m. There was again no record of what Respondent was doing during his tour.

Respondent started his tour at 10:00 a.m. on October 2, 2007. Vagnini was scheduled to start that day at 10:33 a.m. but did not arrive at the command until approximately 11:30 a.m. (with a crossing of the Tappan Zee Bridge at 11:03 a.m.). There was no record of what Respondent was doing during his tour. The next day, Respondent started his tour at 9:40 a.m. Vergeli was scheduled to start at 5:00 a.m. but did not arrive at the command until approximately 10:00 a.m.

On October 4, Respondent started his tour at 4:25 a.m., which was before Vergeli and Vagnini's scheduled start times. Similarly, Respondent started the next day at 9:50 a.m., which was again before Vagnini's start time. Even though Vagnini was over an hour late to work on October 9, he was present in the command by the time Respondent started at 12:00 p.m. And even though Deshazo and Vergeli were both late to work on October 10 and October 11, they were present in the command by the time Respondent started his tour on those days. On October 10, Respondent's tour started at 10:25 a.m., and Vagnini did not arrive for his 7:27 a.m. tour that day until approximately 12:00 p.m. On October 11, Respondent's tour started at 9:45 a.m., and Hewitt did not arrive for his 7:30 a.m. tour until 9:45 or 9:55 a.m.

On October 18, Respondent started his tour at 9:10 a.m., which was before Hewitt's scheduled start time. Even though Vagnini was late to work on October 23, he was present in the command by the time Respondent started at 11:20 a.m. On October 25, Vergeli was scheduled to start at 12:27 p.m. but did not cross the Newburgh-Beacon Bridge until 12:33 p.m. Respondent started his tour at 6:40 a.m. that day but according to the movement log was out of the building between 7:30 a.m. and 2:30 p.m. On October 26, Respondent stated his tour at 10:15 a.m. Vagnini was scheduled to start at 10:00 a.m. but did not cross the Tappan Zee Bridge until 10:03 a.m. He arrived at the command approximately a half hour later.

Respondent did not have access to the personal E-ZPass records of any of his subordinates. DiVirgilio determined that there were signature discrepancies on the roll calls based on his review of the roll calls. He did not have forensic handwriting analysis conducted. Every member of the team was questioned as to the signature discrepancies. DiVirgilio testified, "Part of one of the [official Department interviews was] where each member of service was shown every roll call that was suspect and they acknowledged that it wasn't their signatures, others were signing for them and it was their signature on other roll calls and they were signing for other people." Although Respondent was working on certain days when the signature discrepancies occurred, nobody indicated that Respondent was aware that the team members were signing for one another. There was nothing improper about Respondent's signatures on the roll call.

On redirect examination, DiVirgilio confirmed that Respondent was obligated to follow the procedures outlined in the April 18, 2007 memorandum issued by Chief Izzo. Respondent would not have been relieved of his responsibilities of supervising the

members of his module if his office was located on the other side of the building. Respondent would have been charged with the task of reviewing the roll calls even when MOS under his supervision were scheduled to work earlier than he was or signed in later than the time that he came in. Based on DiVirgilio's investigation, Respondent failed to supervise the MOS who were coming into work late and signing in for times earlier than their actual arrival times. DiVirgilio explained that if Respondent noticed a possible signature discrepancy on the roll call, he was obligated to "at the very least make an inquiry, approach the officer and make an inquiry and if he is satisfied with the answer that is the end of it. If the officer doesn't have an answer he takes it to the next level." Hewitt was directly involved in the signature discrepancies in that he directed officers under his supervision to sign him in and out on the roll call. Moy, the watch commander, forfeited 20 penalty days for failing to review roll calls.

On recross-examination, DiVirgilio testified that there should have been a supervisor assigned as watch commander on every tour. At no time was Respondent assigned that role. Nobody who sat at the watch commander's desk ever came forward to indicate that something was amiss. When asked if he had reason to believe that Respondent did not review the roll calls, DiVirgilio replied, "I believe that roll calls were reviewed. [Respondent] should have reviewed the roll calls when he started his tour, some time during the tour the roll calls should be reinspected, he should sign it and he is also tasked with certifying the roll call when everyone is end of tour." The roll calls that DiVirgilio inspected had in fact been reviewed and signed. He had no reason to believe that Respondent noticed discrepancies and failed to pursue the issue. Even though the

April 18, 2007 memorandum dictated that all teams within a module were to sign in and out on the same sheets, the 40 module continued to use separate roll calls.

Respondent's subordinates were signing in for each other even before Respondent assumed the position of module lieutenant.

Respondent's Case

Respondent called Inspector Edward Mullane, Lieutenant Christopher Meyer, Sergeant Richard Hewitt, and Lieutenant Christopher Von Kessel as witnesses, and he testified in his own behalf.

Inspector Edward Mullane

Mullane is currently assigned as the Executive Officer of the Narcotics Division. He served as Commanding Officer of NBBX between March 2008 and December 2010. During that period, Respondent worked under his command as a module lieutenant. Respondent's duties were the "overall supervision and enforcement of personnel assigned to that team, and overall supervision for the enforcement initiatives in the 40 Precinct from the narcotics perspective."

When Mullane started in his assignment in March 2008, attendance was taken via roll calls, which were kept near the front door at the watch commander's desk. A roll call included a sign-in and sign-out sheet and movement log. Attendance was monitored by the watch commander, but team supervisors were also responsible for monitoring the roll call and the movement of their personnel. As per the Narcotics Division Manual, the watch commander was responsible for a litany of duties, which included monitoring the

roll calls, people entering and exiting the command, personnel going to court, and manning the telephone. Mullane believed that the policies concerning supervisors' responsibilities to review roll calls were the same in 2007 as they were when he started his assignment in March 2008. As of March 2008, both teams in the module signed in on the same roll call, sign-in sheet, and movement log.

Mullane testified that NBBX is housed in a big facility. While the module members sat in close proximity to the lieutenants' offices, Mullane did not have a specific recollection of exactly where Respondent's office was located. Respondent's office would have been separated from the watch commander's desk by a hallway and a main office area. Mullane did not recall Respondent ever asking him if he (Respondent) could carry the roll calls for his module instead of leaving them at the watch commander's desk.

On cross-examination, Mullane testified that he supervised Respondent in 2008 and 2009. He was not happy with Respondent's overall performance, but he did not personally prepare Respondent's performance evaluations.

Lieutenant Christopher Meyer

Meyer, who is currently assigned to the 52 Precinct, worked in NBBX between October 2008 and March 2010. When he first started in the command he worked at the watch commander's desk, where he was responsible for the comings and goings of members assigned to the unit. Upon review of the 2004 Narcotics Division Manual (RX A), he testified that the watch commander duties enumerated in the manual were the same ones that he was responsible for when he started his assignment in October 2008.

At that time, the roll calls for both teams in a module were kept on the same clipboard. NBBX was not following the directives of the April 18, 2007 memorandum from Chief Izzo; however, each team still had its own sign-in and sign-out sheet.

On cross-examination, Meyer testified that the primary duty of the watch commander is to prevent any irregularities regarding members signing in and out. He did not recall hearing anything about module members receiving charges for signature discrepancies when he started at NBBX in October 2008. While he was assigned to Vice Enforcement, he received a Command Discipline for failing to document overtime.

Sergeant Richard Hewitt

Hewitt, who is currently assigned to the 52 Precinct, recalled that in 2008, he forfeited 60 vacation days after he pleaded guilty to charges and specifications of operating a Department vehicle without permission or authority to do so, failing and neglecting to safeguard his Activity Log, failing to supervise other MOS under his supervision, failing to sign out in the command roll call and movement logs as required on 14 occasions, causing false entries to be made in Department records, and failing and neglecting to maintain Department records.

Hewitt worked in NBBX between 2006 and 2008. While working in the 40 module, Lieutenant Hoyt was initially his supervisor. Respondent became his supervisor in 2007. He explained the layout of the command at that time. The watch commander's desk was by the front door. To get to the work space, it was necessary to walk past the watch commander's desk, pass through a door, and walk down a hallway. At the end of

the hallway was the main area, where Hewitt and the detectives assigned to the module had their desks. The lieutenants had offices along the outer perimeter of the main area.

Hewitt admitted that he began entering false information regarding time on sign-in and sign-out sheets. While he committed this misconduct, there was a watch commander present near the roll calls. Hewitt neither signed in for other members nor had other members sign in for him. At the time, the roll calls for each module hung on a clipboard. Each team within a module had its own sheet. It was not necessary to check in with the module lieutenant upon arriving at work. Hewitt never made Respondent aware of the improper entries on the roll call.

On cross-examination, Hewitt confirmed that Respondent never asked him about his signature or the signature of other team members on the roll call. Hewitt did not normally have meetings with Respondent. While it was Respondent's responsibility to oversee what Hewitt was doing, they did not have much interaction with each other.

Lieutenant Christopher Von Kessel

Von Kessel has been a module lieutenant in NBBX since 2006. The duties of a watch commander are distinct from those of a module lieutenant. He explained that while the watch commander is responsible for monitoring the roll calls and is in charge of the comings and goings of the members assigned to the unit, the module lieutenant is in charge of the actual operations that the teams perform. One person is not supposed to be assigned to both watch commander and module lieutenant at the same time. There is supposed to be an assigned watch commander to sit at the front desk during each tour.

The roll calls were kept in a room near the watch commander's desk. In 2007, each team within a module had its roll call on its own clipboard. Roll calls have since been combined. After signing in, members proceeded down a hallway toward the back of the building. Members worked in cubicles in a large main room. Respondent's office was located "a pretty good distance" from where his module members sat. In fact, Respondent and the members sat at opposite ends of a large building that used to be a warehouse. Located between Respondent's office and the members of the 40 module were the cubicles of every other NBBX module. Each member sat in a cubicle that was approximately six-feet tall.

Von Kessel reviewed roll calls when he arrived at work, but he did not know if there was a specific requirement to do so. Upon review of the 2004 Narcotics Division Manual, he testified that the watch commander and module lieutenant duties enumerated in the manual were the same ones that were in effect in 2007.

On cross-examination, Von Kessel confirmed that as module lieutenant he has signed off on roll calls and command logs. His tour frequently overlapped with those of his subordinates. He reiterated that he had occasion to review roll calls when he arrived at work. He did this to see who signed in. He would then meet with the sergeant to review what the plans were for the day. He was not aware at the time that there were members of the 40 Module who caused false entries to be made in Department records by signing one another in as present for duty. In 2004, Von Kessel received a Command Discipline.

Respondent

Respondent, a 23-year member of the Department, is currently assigned to Patrol Borough Manhattan North. He was promoted to lieutenant in January 2002 and was elected the Lieutenant's Benevolent Association delegate in NBBX. He has received multiple medals for Excellent Police Duty and a Commendation. He received a rating of 5.0 on his most recent evaluation. He also received a 5.0 on his annual evaluation for 2007.

When Respondent first started in NBBX, he was assigned to the 41 and 42 Modules. He was transferred to the 40 Module in July 2007. This move was considered a "step up," as the 40 Precinct was a busier precinct and this meant more responsibilities for its supervisors. While the 41 and 42 Modules consisted of just one team, the 40 Module had two teams, totaling two sergeants and approximately 16 detectives. Hewitt was the sergeant for one of the teams.

Respondent attended a month-long Narcotics Division training at the Police Academy. When asked what he learned about managing the day-to-day supervision of his subordinates, he explained, "Being a lieutenant in general, you have a general understanding of the supervision of the men underneath you. In addition [in] Narcotics, you have to develop a relationship where you had two different teams and you have to manage them over times when you weren't there because their hours would fluctuate different than yours." For this reason, it was necessary to rely on other supervisors for assistance. The watch commander was the key assistant for ensuring that members arrived to work on time and signed in properly. Respondent described the watch commander as the "guard of the building," whose main function was to "sit there and

ensure people come in on time, sign in properly and make sure nobody is misusing time.”

It was not the direct responsibility of the module lieutenant to monitor the arrival of personnel, as the module lieutenant was not physically present to observe people as they arrived. Instead, the module lieutenant was either in his office conferring with his staff or out in the field. As per the Narcotics Division Manual, the sole duty of the watch commander was to monitor the comings and goings of the people in the building.

Respondent explained why this role was essential at NBBX:

The Bronx Narcotics building is actually two buildings. They have an administrative building with two floors and that's where the watch commander was when you enter. That was connected to a warehouse that was a huge area where cubicles were set up and where the detective can sit and lieutenants were stationed, so the reason it's critical is there's no way anybody in the warehouse can see or even know what's going on in the administrative building so it's key to have a supervisor at that desk to monitor people.

When Respondent arrived at work, he signed in on the roll call. Each team of the 40 Module kept its roll calls and sign-in sheets on its own clipboard. Respondent's name was listed on the roll call for Team 40-01. When asked if when he signed in he reviewed the clipboard for the other module members, he replied, “It depends. Sometimes I would review them. Sometimes I would take a look at both clipboards. . . . If I had something, if there was a search warrant I had to do, it would be different. It would be different everyday.” It was never described as part of his duties that he had to review the clipboards to determine when the members arrived. What he did after he signed in changed from day to day. Sometimes he went upstairs to the administrative office to check his mailbox and confer with his captain about the duties for the day. This process could take as little as 15 minutes or as long as an hour depending on the captain's agenda.

Respondent then went downstairs to where the cubicles were located to see if he had any messages waiting in his office. While Respondent's office was located in the upper left-hand corner of the large warehouse area, the cubicles for the 40-01 members were located in the lower right-hand corner. It was not necessary for Respondent to walk past the team members' cubicles to get to his office, and he could not see the module members as he walked to his office because the cubicle walls were six-feet high. How long he spent in his office changed each day, depending on what the plan was for the day. For example, sometimes his teams had search warrants to execute, and on other days they worked with confidential informants (CI). Respondent then went to check in with his sergeant. Exactly when he did this depended on the day's schedule. The sergeant's desk was in the cubicle area with the rest of the team members. Respondent replied affirmatively when asked if he monitored the module sign-in sheet throughout the day:

I would, as a module lieutenant, I would look at the roll calls all day long, every time I went by throughout the day. I review them, signing in and out to go do the CI Buy, and I want to see if someone in particular was working, if they had a case I had to go over, so that was something I did continuously. Plus, I had to also return verification and sign the bottom of roll calls.

In 2007, there was no electronic verification of when MOS came into the building. In contrast, today members must scan their identification cards to enter the building as a way of monitoring who is arriving. If Hewitt was not at his desk when Respondent wanted to speak with him, Respondent would either ask a detective about Hewitt's whereabouts or he would call Hewitt directly. Hewitt would tell Respondent his location and explain why he was there. Hewitt never gave Respondent reason to believe that he was not in the building when he was supposed to be there. If Respondent

happened to call Hewitt on a day that he was running late to work, Hewitt would sign in at the accurate time when he arrived at the command.

Between July and October 2007, Respondent and Hewitt had overlapping tours on 13 occasions and on only five of those days did they overlap inside the building. Hewitt was scheduled to start his tour at 8:05 a.m. on July 11, but E-ZPass records showed that he did not cross the Tappan Zee Bridge until 9:23 a.m. The distance from the toll to the command was 11.3 or 12.9 miles, depending on which road the driver chose. Respondent estimated that the travel time between the two locations was approximately ten to 15 minutes and that, therefore, Hewitt arrived at the command between 9:33 and 9:40 a.m. Because Respondent started at 9:35 a.m. that day, there was no way for him to determine whether or not Hewitt had arrived on time unless he happened to be present in the roll call room at the exact time that Hewitt was signing in. He did not recall seeing Hewitt that morning. The watch commander should have been present in the area at the time. The watch commander never alerted Respondent that module members were signing in improperly.

While it was indicated on the roll call that Hewitt signed in at 4:27 a.m. on July 12, E-ZPass records showed that he did not cross the Tappan Zee Bridge until 4:54 a.m. Respondent estimated that Hewitt arrived at the command at 5:05 or 5:10 a.m. Respondent started at 4:45 a.m. that day and did not remain in the area of the watch commander's desk for 20 minutes. He reiterated that it was not his responsibility to review the roll call when he signed in. There was, therefore, no way for Respondent of knowing exactly when Hewitt arrived. At the time, he believed that Hewitt was a responsible MOS, and he did not expect Hewitt to make false entries on the roll call.

On July 13, Hewitt started his tour at 9:30 a.m. Because Respondent did not start until 3:15 p.m., he did not have the ability to check when Hewitt actually arrived that day. Similarly, Hewitt started his tour at 4:30 a.m. the next day. And because Respondent did not start until 6:20 a.m., he did not have any way other than through the watch commander of determining whether Hewitt arrived on time.

On July 17, Respondent started his tour at 9:25 a.m. and was out in the field conducting "CI buys" at 1:30 p.m., Hewitt's scheduled start time. Again, other than through the watch commander, Respondent had no way of determining whether Hewitt arrived on time. On July 19, Respondent started his tour at 6:55 a.m. and left immediately for the funeral of an officer who had been killed in the line of duty. Hewitt was scheduled to start at 6:27 a.m. that day but did not cross the Tappan Zee Bridge until 7:08 a.m. Respondent estimated that Hewitt arrived at the command between 7:18 and 7:25 a.m.

On August 9, Respondent started his tour at 9:45 a.m. Hewitt was scheduled to start at 9:30 a.m., but E-ZPass records showed that he did not cross the Tappan Zee Bridge until 10:26 a.m. Respondent estimated that Hewitt arrived at the command that day at approximately 10:40 a.m. Because it was the duty of the watch commander to ensure that members arrived on time, Respondent felt that there was nothing he should have done between 9:45 and 10:40 a.m. to determine whether Hewitt had come to work on time. Had he known that Hewitt was improperly signing himself in on the roll call, Respondent would have taken disciplinary action. Respondent did not have access to Hewitt's E-ZPass records, and the fact that Hewitt was committing this misconduct never came to his attention.

Hewitt was scheduled to start his tour at 9:30 a.m. on August 10, but E-ZPass records showed that he did not cross the Tappan Zee Bridge until 9:53 a.m. Because Respondent did not start until 11:00 a.m. that day, he was not yet at work when Hewitt arrived at approximately 10:00 a.m. Similarly, even though Hewitt was 20 or 25 minutes late for his scheduled 9:30 a.m. start time on September 7, Respondent did not start until 12:45 p.m. that day and was, therefore, not yet present in the command when Hewitt arrived.

On September 15, Respondent started his tour at 3:00 p.m. Hewitt was scheduled to start at 3:30 p.m., but E-ZPass records showed that he did not cross the Tappan Zee Bridge until 4:37 p.m. Respondent estimated that Hewitt arrived at the command approximately ten minutes later. Because it was the duty of the watch commander to ensure that members arrived on time, Respondent felt that there was nothing he should have done to determine whether Hewitt had come to work on time that day. The same is true of September 18, a day that Respondent started at 9:15 a.m. and Hewitt was scheduled to start at 10:30 a.m. but did not arrive at the command until approximately 10:37 a.m. (with a Tappan Zee Bridge crossing at 10:27 a.m.).

Hewitt was scheduled to start his tour at 7:30 a.m. on October 10, but E-ZPass records showed that he did not cross the Tappan Zee Bridge until 9:22 a.m. Because Respondent did not start until 9:45 a.m. that day, he was not yet at work when Hewitt arrived at approximately 9:33 a.m. Respondent started his tour at 9:10 a.m. on October 18. Hewitt was scheduled to start at 9:30 a.m., but E-ZPass records showed that he did not cross the Tappan Zee Bridge until 9:39 a.m. Respondent estimated that Hewitt arrived at the command ten minutes later.

After Hewitt and the detectives on the team were charged with misconduct, Respondent advised the lieutenants in the command to take the roll call clipboards off the wall and carry the clipboards with them so that Module members would be unable to make entries for other MOS. The commanding officer, however, wanted the clipboards to be kept in the front of the command because it was the responsibility of the watch commander to ensure that people arrived on time.

When he was asked what he could have done differently to ensure that his subordinates properly signed in on the roll call, Respondent replied, "I've been thinking about this for five years. There is nothing I could have done differently to catch those guys doing what they were doing in my capacity as the module commander." Module members had been making improper roll call entries before Respondent assumed his position as module lieutenant. The previous module lieutenants were not investigated. Even though the watch commander should have caught the misconduct from the beginning, no watch commander was investigated or served with charges.

Respondent reiterated that he checked the roll calls throughout the day, and at the end of tour he was responsible for verifying them. The purpose of this verification process was to ensure that all members were accounted for. When Respondent signed at the bottom of the roll calls he was not verifying that all the information on the roll call was accurate since it would not have been possible for one supervisor to know whether or not all entries were accurate.

Detectives and officers in the module reported directly to the sergeant after they signed in. Detectives, officers, and the sergeant all sat in the same cubicle area. Respondent's subordinates did not come find him when they arrived at work unless he

FINDINGS AND ANALYSISSpecification No. 1

It is charged that during the period between July 1, 2007, and October 31, 2007, Respondent, while assigned as module supervisor for the 40 Module, Narcotics Borough Bronx (NBBX), wrongfully and without just cause failed to supervise MOS under his supervision who were directing other MOS to “wrongfully indicate” that officers were present for duty or end of tour.

The Assistant Department Advocate (the Advocate) stated that in this charge the cryptic phrase “wrongfully indicate” does not refer to any verbal or written communications made to Respondent. Rather, the Advocate stated that the phrase “wrongfully indicate” refers to false entries on roll calls made by MOS assigned to the 40 Module who were signing in and signing out for each other to cover up their late arrivals and/or early departures from the command.

The Advocate agreed that MOS assigned to the 40 Module had been engaging in the falsification of roll call entries by signing in and out for each other as early as November 1, 2006. Thus, when Respondent was assigned as the supervisor of the 40 Module on July 1, 2007, this conspiracy to falsify roll call records had been ongoing for eight months. The Advocate further agreed that Sergeant Hewitt, who was one of Respondent’s two team leaders, was the “MOS under his supervision” who was engaged in this conspiracy to falsify roll call records by “directing other MOS to wrongfully indicate that police officers were present for duty or end of tour.”

Thus, the Department’s position is that immediately after his arrival at the 40 Module on July 1, 2007, Respondent should have been able to discover this conspiracy to

falsify Department records even though one of the MOS who was engaged in falsifying these time records was a supervisor who the newly-arrived Respondent was relying on to supervise the actions of the MOS on his team.

The Advocate argued that if Respondent had started reviewing and inspecting roll call, as he was required to do pursuant to Chief Izzo's April 18, 2007 Memorandum (DX 1), as soon as he arrived to supervise the 40 Module on July 1, 2007, Respondent would have been able to immediately discover that MOS assigned to the 40 Module were signing in and signing out for each other on the roll calls to cover up their late arrivals and/or early departures from the command.

However, it is not disputed that Respondent's predecessor as supervisor of the 40 Module did not discover this conspiracy to falsify roll call records during the eight month period between November 1, 2006 and July 1, 2007, and DiVirgilio confirmed that Quality Assurance investigators did not suspect until October 17, 2007, that MOS assigned to the 40 Module were signing in and signing out for each other on roll calls. DiVirgilio testified that even though Quality Assurance investigators visited NBBX at least once a week, and as often as two or three times a week, between July 1, 2007 and October 17, 2007, and even though on each of those visits the investigators had surveyed the command, inspected Activity Logs, and confirmed that MOS listed as signed in on the roll call were actually present, apparently none of these investigators noticed any roll call discrepancies until Lt. Murphy did during his visit to NBBX on October 17, 2007.

Since Respondent's predecessor and Quality Assurance investigators, whose job it was to discover such discrepancies, apparently missed spotting the 40 Module roll call

discrepancies during the eight month period between November 1, 2006 and July 1, 2007, Respondent should not be held to a higher standard of discovery than these investigators.

The Advocate also argued that since DiVirgilio noticed that some of the entries made on the roll calls during the period between July 1, 2007, and October 31, 2007, appeared to have a suspiciously similar handwriting style, Respondent should also have been able to discern these handwriting similarities. However, DiVirgilio testified that he became familiar with the writing styles of MOS assigned to the 40 Module because he reviewed 18 months worth of roll calls and command log entries as he searched for patterns of similar signatures. It is not disputed that when Respondent arrived at the 40 Module on July 1, 2007, he was unfamiliar with the handwriting styles of the MOS who had just been placed under his supervision. Finally, although, as per Chief Izzo's Memorandum, Respondent had the duty to "verify and certify the previous day's roll call" regarding MOS assigned to the 40 Module, the Narcotics Division Manual specifically states that it is the Watch Commander who "is responsible for observing that members arrive in a timely manner and accurately enter their starting times on the roll call."³

Respondent is found Not Guilty of Specification No. 1.

Specification No. 2

It is charged that Respondent, while assigned as module supervisor for the 40 Module on or about and between July 1, 2007, and October 31, 2007, wrongfully and

³ Narcotics Division Manual, Procedure No. 10-05, p. 3, Watch Commander (3).

without just cause failed to supervise other MOS under his supervision in that MOS were arriving late to work and failed to submit lost time reports.

Respondent does not dispute that during the charged time period he directly supervised Hewitt. As Hewitt's immediate supervisor, Respondent was responsible for ensuring that Hewitt was at the command when he was supposed to be there and that if Hewitt arrived late for the start of his tour, Respondent was responsible for ensuring that Hewitt submitted a lost time report.

DiVirgilio obtained Hewitt's E-ZPass records, which showed that he passed over the Tappan Zee Bridge or the Newburgh-Beacon Bridge each day on his way to work. He compared these E-ZPass records to the roll calls which contained entries as to what time Hewitt had supposedly signed in at the command. I credit DiVirgilio's MapQuest-based estimates that it would have taken Hewitt about 27 minutes to travel from either the Newburgh-Beacon Bridge or the Tappan Zee Bridge to the command (DX 5). I find that Respondent's self-serving, unsupported claim that Hewitt could have driven from the toll booth to the command in about ten minutes is unreliable.

DiVirgilio's investigation revealed that on July 11, 2007, Respondent signed in and started his tour at 9:35 a.m. and that although the roll call showed that Hewitt had signed in at 8:05 a.m., E-ZPass records show that Hewitt passed through the toll booth at the Newburgh-Beacon Bridge at 9:23 a.m. Thus, Hewitt could not have arrived at the command on July 11, 2007 until about 9:50 a.m. that day. If, between 9:35 a.m. and 9:50 a.m., Respondent had checked to see if Hewitt was present and upon finding that he was not present, if Respondent had checked the roll call and observed that Hewitt was signed in, Respondent would have then become aware that someone had signed in for Hewitt.

Similarly, the next day, July 12, 2007, Respondent signed in and started his tour at 4:45 a.m. Since E-ZPass records show that Hewitt crossed the Tappan Zee Bridge at 4:54 a.m., Hewitt could not have arrived at the command earlier than about 5:30 a.m. If between 4:45 a.m. and 5:30 a.m., Respondent had checked to see if Hewitt was present and, upon finding that he was not present, if Respondent had checked the roll call, he would have observed that Hewitt was signed in as of 4:27 a.m. that day. Thus, Respondent would have then become aware that another MOS was signing in for Hewitt.

On July 19, 2007, Respondent signed in at 6:55 a.m. Although the roll call showed that Hewitt had already signed in at 6:27 a.m. and begun his tour that day, E-ZPass records establish that he did not cross the Tappan Zee Bridge until 7:08 a.m. and, thus, could not have actually arrived at the command to sign in until about 7:35 a.m. If between 6:55 a.m. and 7:35 a.m., Respondent had checked to see if Hewitt was present and, upon finding that he was not present, if Respondent had checked the roll call, Respondent would have become aware that someone had signed in for Hewitt.

Respondent's failure to ensure that Hewitt was arriving at the command on time for the start of his tour and that Hewitt was not having someone sign in for him is further demonstrated by the fact that on August 9, 2007, although Respondent signed in at 9:45 a.m. and although the roll call reflected that Hewitt had signed in at 9:30 a.m. that morning, E-ZPass records establish that Hewitt did not cross the Tappan Zee Bridge until 10:26 a.m. Thus, if between 9:45 a.m. and 11:00 a.m., Respondent had checked to see if Hewitt was present and after finding that he was not present, if Respondent had checked the roll call, Respondent would have ascertained that someone had signed in for Hewitt at 9:30 a.m.

The September 15, 2007 roll call shows that Respondent signed in as present for duty at 3:00 p.m. While the roll call shows that Hewitt signed in at 3:30 p.m. that day, the E-ZPass records showed that Hewitt did not cross the Tappan Zee Bridge until 4:37 p.m. Thus, he could not have arrived at the command until about 5:04 p.m.

On September 18, 2007, Respondent started work at 9:15 a.m. Although Hewitt was scheduled to start work at 10:30 a.m., he could not have arrived at the command until about 10:54 a.m. because he crossed the Tappan Zee Bridge crossing at 10:27 a.m.

On October 11, 2007, Hewitt was scheduled to start his tour at 7:30 a.m., but E-ZPass records showed that he did not cross the Tappan Zee Bridge until 9:22 a.m. Respondent started work at 9:45 a.m. that day. Thus, Respondent arrived at the same time or was already present at work when Hewitt arrived at, or between, 9:45 or 9:55 a.m.

Finally, Respondent started his tour at 9:10 a.m. on October 18, 2007. Hewitt was scheduled to start at 9:30 a.m., but E-ZPass records showed that he did not cross the Tappan Zee Bridge until 9:39 a.m. Thus, Hewitt would have arrived at the command at about 10:06 a.m.

Respondent's argument that he and Hewitt signed in on different roll calls located in different areas of the command and that it was solely the responsibility of the Watch Commander to ensure that MOS assigned to the 40 Module arrived at work on time and accurately entered their starting times on the roll call sheets, ignores the fact that it was Respondent's direct responsibility to make sure that Hewitt was actually at work when he was supposed to be there and that he was performing his assigned duties.

Respondent is found Guilty of Specification No. 2.

PENALTY

In order to determine an appropriate penalty, Respondent's service record was examined. See *Matter of Pell v. Board of Education*, 34 NY 2d 222 (1974). Respondent was appointed to the Transit Authority Police Department on July 5, 1989. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

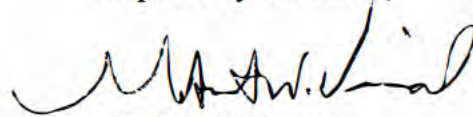
Respondent has been found Guilty of having failed to supervise a sergeant under his supervision who arrived late to work and failed to submit lost time reports during a four-month period in 2007. The Advocate recommended that Respondent forfeit 30 vacation days as a penalty. Since the Transit Authority Police Department was merged into this Department on April 2, 1995, Respondent has not been the subject of Charges and Specifications other than this case. In determining a penalty recommendation, I have also taken into consideration Respondent's outstanding annual performance evaluations.

It is recommended that Respondent forfeit 20 vacation days.

APPROVED
MAY 28 2013

RAYMOND W. KELLY
POLICE COMMISSIONER

Respectfully submitted,



Robert W. Vinal

Assistant Deputy Commissioner – Trials

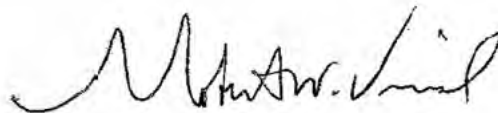
POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner - Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
LIEUTENANT MICHAEL BRENYO
TAX REGISTRY NO. 910416
DISCIPLINARY CASE NO. 2008-0114

Respondent received an overall rating of 5.0 on his 2011 annual performance evaluation, 5.0 on his 2010 evaluation, and 5.0 on his 2009 evaluation. He has been awarded one Commendation, one Meritorious Police Duty medal and three Excellent Police Duty medals. He has been designated Chronic Sick A on five occasions and Chronic Sick B on one occasion. He has no monitoring records.

[REDACTED]

For your consideration.



Robert W. Vinal
Assistant Deputy Commissioner Trials